CULTURE'S OPEN SOURCES

Commentary

Glenn Otis Brown
Creative Commons

Copyright—the law, but also the very word—has an identity problem. To judge from most mainstream media coverage of intellectual property disputes, and the big-media talking points that tend to frame that coverage, copyright is binary, a single switch: when turned off, the result is *piracy*; in the on position, we have *property.* (It is not clear how or when these became perfect antonyms, but George Orwell might have a theory). A person or organization is either pro- or anti-copyright. New technologies are either good for copyright, or bad for copyright. One either *believes* or *does not believe* in file-sharing networks. There is no place for the agnostic.

Nor even the protestant: those who *believe* in this thing called "copyright" as a general matter—but who may differ over its particulars, who propose that the concept has many possible meanings, who dare to ask what the purpose of copyright should be—are cast as heretics. A generalization, of course, but nonetheless an accurate description of the conventional wisdom on copyright today.

If, though, you press an actual author—a writer, a musician, a coder, a teacher—on his or her religion, you're likely to get a more nuanced answer. I don't mean this as a hypothetical exercise; I do this daily as part of my job

managing the nonprofit organization Creative Commons. I push authors to describe precisely what they want other people to do or not do with their creations and, once we get past the knee-jerk Manichean response, a number of different values begin to emerge, values much more meaningful and precise than simply copyright, piracy, or property. Here are paraphrases of the kinds of things I hear regularly:

- I don't care if people trade my band's recordings online, but I don't want one of them to wind up in a political advertisement or something like that.
- I would like other people to build upon my software, but they should share the software that results from that work on the same generous terms I've offered.
- I would be happy for teachers to use my nanotechnology article in their classes or syllabi, but I wouldn't want some company using it to train their employees without telling or paying me.
- I love the Net because it makes it easy to get my poems out there, even to total strangers all the way across the globe. But I do worry about someone passing off my stuff as their own.
- I really like some of the remixes fans have made from my songs, but others are just awful.
- I have a low-resolution gallery of my photographs up on my website to attract interest and get more exposure. If people want the high-quality stuff, or prints, I charge them.
- I put the promotional trailer of my film onto a file-sharing network myself, without telling my distributor. But I would panic if I saw my whole movie online somewhere.

Context, reputation, exposure, commercial value, aesthetics, credit, presentation, formatting, partial use—these are a few of the many connotations that copyright conjures up for authors, the values and combinations of values that the single word represents to different people.

Do the same Rorschach exercise with a lawyer and you'll also get a multipart response—but a slightly different and more definite one. In law, copyright describes a group of many different rights; it is like a surname, or a genus. Copyright is a *series* of switches, or better still, dials. In the default setting, all the dials are set to the maximum. A copyright lawyer (like me) might explain it like this:

A copyright holder enjoys a set of rights in a bit of expression that is fixed in some tangible medium (a "work"). These separate rights include the exclusive rights:

- to copy the work
- to distribute copies of the work
- to exploit the copies commercially
- to make derivative works based upon the work, including but not limited to abridgments, arrangements, dramatizations, motion picture versions, or sound recordings
- to perform the work (in cases of dramatic or musical works) and others.

These exclusive rights can be configured in any number of combinations, at least by those who can afford to pay lawyers to custom-calibrate them. They are limited by a small set of countervailing legal doctrines—fair use and first-sale among them. But practically speaking, these limitations (1) offer little guidance to users of copyrighted material, (2) are very difficult to explain to most authors, and (3) can be very expensive to argue successfully in a court of law.

All this is meant to emphasize two points. First, copyright, despite its monochromatic reputation, is in both everyday practice and theory better described as a spectrum. Second, this spectrum looks different viewed through a legal lens on the one hand and a cultural one on the other. Indeed, in some respects, a massive gap separates copyright's social and legal meanings, the motley bundle of authorial values described above and the linear set of property rights set out by copyright act. This is particularly true the farther one moves from the corporate cultural centers of Hollywood and Madison Avenue and into the *real* source of most of the copyrighted material produced today: the legions of amateurs, in the purest sense of the word, building a massive body of culture online (and offline as well— though the gap between creative culture and the law that governs has expanded as a function of ever cheaper and faster distribution and editing technologies and the legal backlash against them.).

Copyright's forked spectrum *does* overlap in some important respects: authors' concerns about commercialization, the partial use of their works, and the circumstances under which they may be transformed map well onto the enumerated rights of copyright. But in many areas, the differential in values is striking: copyright law says nothing about reputational concerns (this is

trademark's domain), is deliberately silent about aesthetics, and offers little guidance on formatting or quality-of-media issues. Most important (by far), the full-bore protection of default copyright rules often directly clashes with authors' wishes to have their works re-distributed or shared—and by the same token clashes with readers' (and potential authors') expectations about what is proper or improper to do with those works.

The free and open source Software movements deserve the credit for pioneering an ingenious way to bridge this divide: not through litigation or direct policy advocacy—which is expensive and, in today's Hollywood-lobbied Congress, often fruitless—but rather through retrofitting copyright with voluntary licensing and contractual tools. Specifically, and most notable among the movement, Richard Stallman's GNU General Public License used private law tools to build into copyright law one of the bedrock principles of the coder culture: that, regardless of what else one might do with it, code must always remain accessible, free to build upon, and free to re-distribute. The GNU GPL, like all F/OSS licenses, crystallizes a norm the law has yet to acknowledge.

Creative Commons uses the same sort of legal hack to formalize norms in the world of non-software copyrights. Our tagline, "some rights reserved," not only invites people to recognize copyright for the multi-part spectrum that it is, it also reflects the preferences of most everyday authors on the Net (or so went our hunch, which is increasingly proving correct). We offer users who want to free up distribution of their work a set of conditions they may require in exchange: require attribution, prohibit commercialization, prohibit derivative works, require that derivatives be shared on the same terms as their source material. Each option is represented by an icon intentionally designed to echo the ubiquitous, and thus increasingly meaningless, copyright © (we like hacking cultural symbols as well as the laws they represent.). These options—norms made law via private ordering—grew out of informal surveys of and conversations with different kinds of authors.

So here's where anthropology comes in, and why its contribution to the copyright debate is crucial—indeed could very well form what values the next generation's copyright will reflect.

Lawyers are not very good at spotting normative trends. We're not trained for it. In fact we're trained against it: a good judge or lawyer, we learn, recognizes when she's strayed too far into the topsy-turvy world of culture, politics, or art. This is particularly true where norms involve questions of aesthetics: you don't want lawyers spotting beauty, and we're too scared to even try. As Oliver Wendell Holmes put it, in the seminal copyright decision *Bleistein v.*

Mazer: "The taste of any public is not to be treated with contempt." In deciding that even a simple promotional poster for a circus was copyrightable, Holmes articulated a broader principle about the institutional competence of judges: "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."

This sounds wise, but here is the catch: copyright is about nothing *but* the regulation of aesthetic expression. On the one hand, Holmes says don't play art critic, but on the other, all copyright disputes come down to questions like, "What is the difference between parody and satire?," "What is originality?," "Are these works substantially similar?," "Is this alteration transformative?," "Is this work closer to a Platonic ideal, or more like a specific incarnation of that ideal?" What is a judge or policymaker to do?

They should punt to culture, to use Kelty's phrase (as appropriated from me, I should note—ego is another value embedded in the culture of copyright). The arbiters of copyright must defer to a consensus among those who *must* play art and cultural critic, a consensus identified through the adverse testimony of battling expert witness-artists, or through the development of a norm so deep and broad-based that legislators take it for granted as correct and true.

More often than not, however, copyright policymakers do not recognize the limits of their institutional competence. They declare recombinant forms of art artless, or simply piratical, without a hint of self-awareness that an aesthetic or cultural judgment is being made, that certain emergent tastes are indeed being held, if not in outright contempt, then to a higher standard than established forms of art. In the mouths of judges and politicians, copyright hysteria can sound uncannily like the rhetoric of obscenity wars of past generations (information itself is said to be "promiscuous," and indeed the Recording Industry Association of American argues, pretextually, that it wants to stop file-sharing because it wants to stop porn.) Like Justice Stewart Potter trying to define obscenity decades ago, many policymakers today operate on a hunch when trying to distinguish a clear-cut legal violation from a subtle bit of artistic innovation. It is hard to imagine anything further from aesthetic neutrality or transcendent principles than the jurisprudence of "I know it when I see it." And yet that's how it tends to work.

All of this is bad news for traditional legal activism in the copyright field—for progressive litigators and lobbyists—as I've mentioned before. But it also means that the battle over copyright has become a battle of attitudes, thus opening up new opportunities for the new brand of copyright policymakers, the

norm entrepreneurs: the legal hacker, the policy-savvy artist, the copyright-cult anthropologist. These opportunities take roughly two forms: first, if it is the case that judges' and policymakers' notions of creativity and regulation stem from unconsciously held background beliefs, it is the copyright entrepreneur's job to expose those taken-for-granted attitudes and begin to sow doubt among practicing authors and readers—to use the tools of analysis and critique to break up monolithic attitudes about copyright and spark real debate.

The second opportunity is more interesting, more promising, and insidiously more activist. I like to call this approach to copyright reform "creative civil obedience." The idea is to build a parallel system of copyright within the current system, to use contract and copyright law and technology to build a shadow copyright system, a more balanced system that better reflects the preferences of the emerging creative culture. This world of alternative copyright can act as a haven for copyright progressives, but its significance is larger: it also serves as a draft for copyright's future, a model for what copyright could or should look like. There has been little formal cooperation between lawyers and anthropologists in this area until now, but the more that the lawyers come to realize that the real action in the copyright debate takes place far from the courtroom, in the wilds of culture, the more they should turn to the natives of norms—anthropologist and artists—to lay plans for this new system.